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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1144

FRANK LOMPREZ, JR.
and
JOSEPH WILLIAM SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

Frank Lomprez, Jr. and Joseph William Smith, your Petitioners herein, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, and the Petitioners further request Summary Reversal.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the convictions of the Petitioners is reported verbatim herein.

(App. "B," pp. 1-6) It has not as yet been officially reported. The opinion of the Court of Appeals denying rehearing and hearing en banc is reported verbatim herein. (App. "A," p. 1)

JURISDICTION

The judgment of the Court of Appeals affirming the convictions of the Petitioners was entered on December 14, 1972. (App. "B," p. 1) A petition for rehearing was denied on January 26, 1973. (App. "A," p. 1) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

Whether the introduction into evidence of a false exculpatory statement has independent probative value as evidence of a consciousness of guilt, and whether its introduction into evidence denies to the Petitioner his right to remain silent during trial?

Whether the false exculpatory statement introduced into evidence against the Petitioner should have been suppressed on the basis that it was involuntary?

Whether the evidence was sufficient to support the verdicts of guilty against the Petitioners, and whether the exhibit introduced into evidence which contradicted the Petitioners' alibi violated the best evidence rule.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

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STATEMENT

Jurisdiction in the Trial Court was based on Title 18 of the United States Code, Secs. 2113(a), (b), (d), (Armed Bank Robbery).

Following a jury trial, the defendants, Frank Lomprez, Jr. and Joseph William Smith, were found guilty on a three-count indictment, charging them for the crime of bank robbery, which took place on May 27, 1970, at about 2:20 p.m., at the Bank of Farmersville, Farmersville, Illinois.

The amounts of money taken from the Bank were $5,765.00. On the same night, at approximately 9:00 p.m., police and agents from the Federal Bureau of Investigation arrived at the home of the defendant Smith, after tracing a license number of a car observed at the scene of the crime. Along with defendant Smith were his wife and his children. The officers advised the defendant that they would like to talk to him about a matter that involved his activities on that particular afternoon. Mr. Smith took them into his home, where the interview took place in the kitchen. Before any questioning had been commenced, the defendant Smith was advised by the agents of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

About one-half hour after the statement had been made, the defendant told the agents that he thought he ought to call an attorney. The agents then gave the defendant an opportunity to use the telephone for this purpose, but he made no effort to contact an attorney. The questioning continued.

During the first portion of the questioning as to his activities, the defendant Smith testified that he had driven over to his mother-in-law's house, exchanged cars with

her, and left with his wife and two daughters and went to the K-Mart and shopped for approximately three hours in various departments, but most of the purchases were done in the men's, women's and children's clothing sections. About the middle of the afternoon they returned to the Morgan residence. They had spent approximately $75.00 at the K-Mart. They then picked up their children at his wife's mother's home, and he and his wife continued on in his father-in-law's car, where they went to a tavern, where they stayed approximately thirty minutes. In the statement, he then stated that he left this tavern and went to another tavern and stayed approximately 15 to 20 minutes, and they all returned back to his mother-in-law's home. They stayed there for an hour or two and then went out for dinner, and then returned to the home whereupon the agents began to question him.

During the entire interrogation while his wife was being interviewed in a separate room, the defendant maintained his innocence. A consent to search the defendant's automobile was executed by the defendant, and a receipt was given to the defendant, as to the items found. The FBI testified that a sales slip from the K-Mart with register #6782855 was found among the items in the car, but it was inadvertently omitted on the receipt of items found.

The defendant claimed on motion to suppress evidence that the sales slip from the K-Mart with the particular register number upon it was a result of an illegal search and seizure as this was not listed on the inventory and was not found at that particular time. However, the trial court overruled the motion to suppress on the basis of an unlawful search and seizure.

While the defendant was in custody, on the 15th day of June, 1971, an agent of the FBI brought the sales slip

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from the K-Mart to the defendant, and advised him that it had inadvertently been left off the initial receipt of items found in the automobile, and requested the defendant to sign a receipt for the item of the sales slip. The defendant refused to do so. While the defendant had been interrogated in the kitchen the automobile was being searched in his driveway for approximately 45 minutes. The defendant objected to the introduction of the sales slip from the K-Mart Store on the basis that its admission violated the best evidence rule. The purpose of the exhibit was to demonstrate that defendant was not in the K-Mart Store at the time of the bank robbery, and that his statement to that effect to the FBI agents thus constituted a false exculpatory statement. A clerk from the store, whose testimony provided the foundation for the admission of the sales slip, stated that she referred to a book in her office for the purpose of determining which cash register had issued the sales slip. Certain cash registers were only opened at a particular time, and the clerk testified that that particular sales register from which the sales slip came was not open until the evening hours, rather than as the defendant claimed sometime during the afternoon. The defendant maintained that the book should have been offered by the government as it constituted the best evidence of which register the sales slip originated.

Four witnesses testified as to identification of the defendants, three of whom were bank personnel and one was a neighbor in the immediate vicinity of the bank. Each defendant was identified by two witnesses only.

One of the prosecution witnesses testified that the defendant Smith was in her tavern anywhere from 2:30 to 2:45 on the day of the bank robbery.

The defendant Smith presented witnesses that the defendant Smith and his wife came into the tavern about 1:30

with his two little girls and they left about 2:30 to 2:45 p.m. Another witness testified that the defendant was in the tavern from approximately 1:00 p.m. to 4:00 p.m. on the date of the robbery.

The mother of the defendant, Frank Lomprez, Jr., testified that he came home on the day of the robbery about 1:00 in the afternoon, went upstairs and went to bed. She next saw him after 4:00 p.m. when he left with her nephew to look for a car. She did not see him from the time he went upstairs, however, at 1:00 until 4:00 p.m.

The distance from the bank to the Smith home was 26 miles. An FBI agent testified that driving during daylight hours at an average speed of 65 to 70 miles per hour the journey between the bank and the home of the defendant Smith takes approximately 35 minutes. There was no connection established in the record between the defendant Frank Lomprez, Jr., and the defendant Joseph Smith.

The jury returned verdicts of guilty on all three counts as to each defendant. The defendant Frank Lomprez, Jr. was sentenced for a term of 18 years on Count III, and the defendant Joseph Smith was sentenced for a period of 20 years on Count III of the indictment.

Neither of the defendants testified in their own behalf.

REASONS FOR GRANTING THE WRIT

I.

The court below has decided Federal questions of substance in conflict with the due process principles enunciated in this Court. It has departed from the accepted and usual course of judicial proceedings, and its sanction of such departure by the Trial Court resulted in an erroneous judgment and a miscarriage of justice, and deprived the

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Petitioners of their rights to due process of law and protection of the law.

United States v. McConnery, 329 Fed. 2d 467, 470 (2d Cir. 1964), was a cornerstone upon which it was held that the statement made by the defendant Smith constituted a false exculpatory statement and therefore had independent probative value as evidence of a consciousness of guilt. *McConnery,* supra, however, said that it would place too much weight on the defendant's extra-judicial exculpatory statement to authorize a conviction based almost solely on the fact that part of the statement, not involving the corpus dilecti of the crime, was shown to be false. The Court said the other evidence of guilt was extremely weak and the statement itself was not sufficient independent proof to justify denial of the motion for acquittal. Further, *United States v. Smolin,* 182 Fed. 2d 782 (2d Cir. 1950) holds that exculpatory statements made upon interrogation when shown to be false are circumstantial evidence of guilty consciousness and have independent probative force. This position taken by the Court of Appeals manifests a repudiation of the defendant's rights that he can not be compelled in any criminal case to be a witness against himself.

The government has taken statements not involving the corpus dilecti of the crime and proved them false. This is in effect setting up straw men and then knocking them down. To allow a statement which is later shown to be a false exculpatory statement the status of a confession or an admission is a denial of the defendant's rights to due process of law and his right to remain silent under the Fifth Amendment to the Constitution of the United States.

II.

The Court of Appeals determination that the defendant Smith was advised by the agents of the full ambit of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966),

constitutes a sweeping departure from *Miranda,* supra. The defendant after one-half hour of interrogation stated that he was getting involved in something and that he better obtain the services of a lawyer. An opportunity was allowed for him to contact one by telephone, but the defendant did not, in fact, contact a lawyer. Thereafter the interrogation continued. We respectfully suggest that during a continuous interrogation, if the defendant requests the assistance of counsel, the interrogation should be broken off and that anything the defendant had said previously should be suppressed in order to make *Miranda,* supra, a meaningful exercise to the rights of the defendant. The color of authority which all police and investigative personnel are clothed with suggests that persons may initially be intimidated to answer questions, but that during a later point of the interrogation the witness realizes that the interrogation initially instituted was not to gain information but was accusatory and investigatory from the onset. Therefore, to make meaningful the rights under *Miranda,* supra, the entire interrogation should be suppressed.

III.

The Court of Appeals erred in its determination that the sales slip from the K-Mart Store was properly admitted into evidence and did not violate the best evidence rule on the basis that the book which was kept in her office which determined which cash register had issued the sales slip was not a book which was a record of transactions, but was merely a reference manual which would have added nothing to the testimony of the witness. Since the so-called book was not essentially a written transaction, it did not fall within the requirements of the best evidence rule. However, the clerk testified from her recollection which register the sales slip came from, thereby establishing the time. The defendant could not cross-examine the

accuracy of her testimony due to the absence of the book. It is suggested that the book was not a mere reference manual, but was a business record, and as such would have had independent admissibility pursuant to Section 1732, Title 28, United States Code Annotated. Although the business record provision is merely an exception to the hearsay rule and a codification of the old shop book rule, the book clearly falls within its purview. If the book which was kept in the ordinary course of business would have been admissible under the business record provision, it is suggested that the Court erred in stating that the book was not essentially a written transaction. If this reasoning be correct, then the sales slip admission violated the best evidence rule because the best evidence of the origin of the sales slip was the book in the office. This was crucial testimony in that it purportedly destroyed the alibi of the defendant Smith.

Further, the Court of Appeals determination that the evidence was sufficient to support the guilty verdict is a sweeping departure from the accepted and usual protections guaranteed by the Fifth Amendment to the Constitution. It is noted that there is no testimony whatsoever in the record to connect the defendant Frank Lomprez, Jr., with the defendant Joseph William Smith, and further, that the defendant Frank Lomprez, Jr. did not make any false exculpatory statements. To hold that the evidence supported the jury verdict is to depart from the standards enunciated in *Glasser v. U.S.*, 315 U.S. 60, 80 (1941).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari and Request for Summary Reversal should be granted. The decision below is palpably erroneous.

Respectfully submitted,

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February, 1973

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 26, 1973

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WILLIAM J. CAMPBELL, SR., District Judge

Nos. 71-1106 & 71-1110
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

FRANK LOMPREZ, JR. and
JOSEPH WILLIAM SMITH,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division. (Crim. 7012)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1971 — April Session, 1972

Nos. 71-1106, 71-1110

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK LOMPREZ, JR., and
JOSEPH WILLIAM SMITH,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division. (Crim. 7012) OMER POOS, Judge.

Argued June 15, 1972 — Decided December 14, 1972

Before FAIRCHILD, Circuit Judge, SPRECHER, Circuit Judge, and CAMPBELL, Senior District Judge.*

CAMPBELL, Senior District Judge. Following a jury trial in the Southern District of Illinois, the defendants Frank Lomprez, Jr. and Joseph William Smith, were found guilty on a three count indictment charging them with bank robbery, in violation of 18 U.S.C. §2113(a), (b) and (d). Judgments of conviction were entered on the verdicts and the defendants have appealed, raising some twelve contentions of error. We affirm.

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

The defendants object first to the introduction into evidence of a statement made by the defendant Smith to agents of the Federal Bureau of Investigation during their questioning of Smith at his home on the evening of the robbery. The robbery had taken place at the State Bank of Farmersville, Farmersville, Illinois at about 2:20 P.M. on May 27, 1970. At 9:00 P.M. that evening the police and agents of the Federal Bureau of Investigation arrived at the defendant Smith's home after tracing a license number of a car observed at the scene of the crime. During the questioning, Smith told the agents that at the time of the robbery he was shopping at a nearby store with his wife and two children. Before any questioning had been commenced, the defendant Smith was advised by the agents of the full ambit of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966). About one-half hour into the interview but after the statement had been made, the defendant told the agents that he thought he ought to call an attorney. The agents then gave defendant Smith an opportunity to use the telephone for this purpose, but he made no effort to contact an attorney. The questioning continued.

The government contends that the defendant Smith was not "in custody" within the meaning of *Miranda* and that since the questioning was conducted in a non-coercive atmosphere, the statements were voluntary and thus admissible into evidence. The admissibility of the statements, however, need not turn upon a determination of whether the defendant was "in custody." Inasmuch as the full *Miranda* warnings were given the defendant and since the statements were made prior to the defendant's expression of a desire to contact an attorney, we believe that the statements were voluntary and thus admissible into evidence.

The defendants next contend that since the statements

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did not amount to a confession or an admission, their introduction violated the defendant's privilege against self-incrimination. The government's theory, with which we agree, was that the statement constituted a "false exculpatory statement" and thus had independent probative value as evidence of a consciousness of guilt. See *United States v. McConnery*, 329 F. 2d 467, 470 (2d Cir. 1964). The defendants maintain that "false exculpatory statements" are admissible only where the defendant has testified and thus waived his privilege against self-incrimination. No authority is cited for this contention and the *McConnery* case contravenes its validity.

The defendants also claim that the district court erred in refusing to grant a severance and in failing to give an instruction limiting the jury's consideration of the false exculpatory statement of defendant Smith to defendant Smith alone. Relying on *Bruton v. United States*, 391 U.S. 123 (1968), the defendants argue that the false exculpatory statement of the defendant Smith prejudiced the defendant Lomprez. Unlike the situation in *Bruton*, however, the defendants here were not charged with a conspiracy. No instruction permitting the jury to consider the statements of a co-conspirator against another co-conspirator was given. The statement itself related only to the defendant Smith's activities on the day in question and thus could not have prejudiced the defendant Lomprez.

Another error occurred, the defendants say, when the district court refused to order prior to trial the production of a statement made by the defendant's Smith's wife to the FBI agents on the evening of May 27, 1970. Since the defendant's wife was not called as a government witness, neither Rule 16 of the Federal Rules of Criminal Procedure nor §3500 of Title 18 of the United States Code

require such production and, thus, the defendant's argument is without merit.

The same is true with respect to the defendants' contention that government exhibit 8 was improperly admitted into evidence. The exhibit consisted of a sales slip from the K-Mart Store where the defendant Smith, in his statement to the FBI agents, claimed he was at the time of the robbery. The sales slip was discovered during a search of the trunk of the defendant's automobile. Since the defendant Smith consented in writing to the search, its fruits were properly admissible into evidence.

A further objection to the admission of government exhibit 8 is raised on the ground that its admission violated the best evidence rule. The purpose of this exhibit was to demonstrate that the defendant was not in the K-Mart store at the time of the bank robbery and that, therefore, his statement to that effect to the F.B.I. agents thus constituted a "false exculpatory statement." A clerk from the store, whose testimony provided the foundation for the admission of the sales slip, stated that she referred to a book in her office for purpose of determining which cash register had issued the sales slip. The defendant maintained that this book should have been offered by the government and that it constituted the best evidence. However, the book was not a record of transactions but was merely a reference manual which would have added nothing to the testimony of the witness. Since the so-called "book" was not essentially a written transaction, it does not fall within the requirements of the best evidence rule. See *Meyers v. United States*, 171 F. 2d 800 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 912 (1949).

Next the defendants maintain that the government suppressed evidence favorable to the defense in violation of

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Brady v. Maryland, 373 U.S. 83 (1963). The supposedly favorable evidence consisted of the statements of two witnesses who could not positively identify the defendants. However, all of the witnesses testified at the trial. Two of these three witnesses made positive in-court identifications of the defendants while one witness was not positive. Too, the government furnished the defense with the name and address of an alibi witness who had been interviewed by the government and whose testimony was favorable to the defense. In view of these facts the defendants' contention that the government suppressed evidence favorable to them is without basis.

It is also asserted by the defendants that prejudicial error occurred in the closing argument of the government. The prosecutor stated to the jury that three witnesses had made positive identification of the defendants whereas the evidence disclosed that only two witnesses made such identification. Although the prosecutor was mistaken about the evidence, we don't believe that his comment rises to the level of prejudicial error. The jury heard the evidence and was thus in a position to properly assess the comment of the prosecutor. The other prosecutorial remark complained of by the defendants consisted of a statement by him that one of the defense counsel had been present at a lineup where he had an opportunity to question the witnesses and that perhaps this lawyer should have testified. Although this comment by the prosecutor was improper, it was immediately objected to and the jury was instructed to disregard it. We find no error in this regard.

Nor are we persuaded by the defendant's contention that the trial court erred in giving an instruction on dangerous weapons. The evidence disclosed that the two men who participated in the robbery were both armed

and that their guns were drawn. The instruction was thus clearly based on the evidence and was not improper.

Yet another contention of the defendants is that there was a fatal variance between the amount of money stated in the indictment and the amount which the proof at trial demonstrated to have been stolen from the bank. The indictment charged that $5765.00 had been taken from the bank. During the trial figures of $5765.00, $5735.00 and $5300.00 were mentioned. The variance, if any, was thus no greater than $465.00. We do not consider such a variance to be fatal.

Lastly, the defendants maintain that the evidence was not sufficient to support the guilty verdict. We disagree inasmuch as two occurrence witnesses positively identified each defendant as a participant in the bank robbery. The credibility of these witnesses and the weight to be given their testimony was clearly for the jury to determine.

For the reasons stated, the judgments of conviction are affirmed.

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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